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# Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED

LEGAL NEWS NOTES AND FACETIÆ

VOL. 5 SEPTEMBER, 1898. No. 4

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## A. P. McCormick.

Among the judges of the United States circuit courts of appeals who have had long and distinguished service on the bench is Andrew Phelps McCormick, of the fifth circuit. He was born December 18, 1832, on a farm near Columbia, then in the Mexican state of Coahuila and Texas, now in Brazoria county, Texas. During his boyhood he attended school in Texas, then went to Danville, Ky., and entered the freshman class in Center College, where he took the full classical course, and received the first honor in the class of 1854. He studied law with Judge Jas. H. Bell, in Brazoria, Texas, whose partner he became when admitted to the bar in December, 1855.

He opposed secession until it became certain that Texas would unite in the movement, but then declined to be a factionist, and cordially took part with his fellow citizens. He entered the Confederate army in April, 1862, remained in the regular service one year, and later was in the field as a member of the state troops. In September, 1865, he was appointed by Provisional Governor A. J. Hamilton chief justice of Brazoria county. A few months later he was elected by the people of Brazoria and Galveston counties a delegate to the constitutional convention called by Governor Hamilton. In 1868 he was elected to the constitutional convention called to carry into effect the reconstruction measures of Congress. In October, 1871, he was appointed by Governor E. J. Davis state district judge for the district composed of Brazoria and Galveston counties. Up to this time he had continued in active practice at the bar, his service in the army not having taken him away from the district of his residence. He remained judge until April 17, 1876, and on the next day took his seat in the state senate for the district composed of the counties of Galveston, Brazoria, and Matagorda. He resumed his practice at the bar, and in the winter of 1878 was appointed United States district attorney for the eastern district of Texas, but as his commission arrived while the senate was in session, he was allowed by President Hayes to defer qualifying as district attorney until the senate adjourned, and before its adjournment was nominated by President Hayes for judge of the United States district court for the newly created northern district of Texas. His appointment was confirmed by the senate April 10, 1879, and in January, 1892, he was nominated by President Harrison United States circuit judge for the fifth judicial circuit, and his nomination was confirmed on March 17, 1892, since which time he has been a member of the circuit court of appeals, fifth circuit, composed of the circuit justice, the senior judge, Don A. Pardee, and himself. Nearly twenty years' service in the Federal courts of that circuit, with his previous judicial service in the state court, has given Judge McCormick a wide reputation.

He was married on September 8, 1859, to Mary Copes, of Brazoria county, Texas, who died January 12, 1870, leaving six children, two sons and four daughters, all of whom are still living. On March 1, 1871, he married Lula Bell. They have five children, one son and four daughters. His family residence is Oak Cliff, Dallas county, Texas.

## A Peril of Cashing Drafts with Bills of Lading Attached.

A decision that will startle commercial circles was rendered in Landa v. Lattin (Tex. Civ. App.) 45 S. W. 48. That case held that a bank which cashed a draft drawn by a consignor on a consignee of wheat, with a bill of lading attached, and collected the draft before the consignee had opportunity to inspect the wheat, was liable for a breach of warranty as to the quality of the wheat. The bank was held to be a purchaser of the wheat and therefore a successor to the liabilities as well as the rights of the consignor. The court said: "It could not, by delivery of the wheat and electing to reap the benefits of that contract, and demanding the payment of the sum called for, and receiving the same, take the position that it was not a party to the contract between the [consignee] and [consignor], and that in acquiring title to the wheat it became the purchaser thereof unaffected by the burdens of that contract."

The theory that a bank taking a bill of lading with a draft which it cashes succeeds to all the rights of the shipper, and to no greater rights than he had, is not new. But this seems to be the first case to hold that such bank succeeds also to the shipper's liability on a warranty of the goods. In the nature of the case, the purchase of the bill of lading is subject to the obligation to surrender the title to the consignee on payment of the agreed price. In essence, as in form, it seems to be not so much a purchase of the goods, as a purchase of the seller's right to the purchase price, with the legal title to the goods as security therefor. The bank's rights are necessarily subject to all defenses which the consignee may have against the consignor because the claim which it buys is not negotiable. But its liability as a substituted party to the warranty of the consignor in the original contract is a result that was doubtless not contemplated by either party. Such liability can be imposed on the bank only on the ground that it assumed that liability by its contract. This it does not do expressly. And if it was not contemplated or generally recognized as an incident of the transaction, it is not easy to see how such an assumption of the seller's warranty can be implied. Something more than the mere receipt of the purchase price and surrender of title to the property seems necessary to create a liability of the bank to the consignee, unless we are to have the doctrine that covenants run with personal property, or that a purchase of personal property in itself subjects the purchaser to the contractual obligations of his vendor.

## Riparian Owner's Right of Access.

The increase in the value of riparian rights resulting from denser population and larger commerce has given the law of those rights an importance not previously recognized. Unfortunately, the law concerning them is still far from certain and harmonious. The general law, as shown in the note to State, Denny, v. Bridges (Wash.) 40 L. R. A. 593, is, both in this country and England, that a riparian owner has a right of access to navigable water. In England, Ireland, and Canada this right is upheld even as against the public, and compensation is required when such access is cut off by public works, whether in improvement of navigation or otherwise. Such a right has been usually supposed to be as certain and as well assured as any other right. Yet in this country there are some decisions of the highest authority to the effect that the right of access may be entirely destroyed without compensation to the owner when this is done for the improvement of navigation. This is the effect of the late case of Sage v. New York, 154 N. Y. 61, 38 L. R. A. 606. The same doctrine in effect obtains in Wisconsin, where the riparian owner is deemed to hold his right by implied public license, the exercise of which may be prohibited by public law in aid of the public use, and which necessarily gives way to public measures in aid of navigation. The Supreme Court of the United States has also affirmed this doctrine in Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, where it is held that the substantial destruction of a riparian owner's access to a navigable river by the building of a government dike in the river, which kept the water in the main channel and from such owner's landing, was not a taking of property, but only an exercise of a servitude to which the property was always subject. These cases make a great limitation on the right of a riparian owner which may even amount to its substantial destruction. It cannot be said that this limitation has been recognized in most states, although in most of them it has not been expressly considered. It seems more just if a riparian owner's right of access is cut off, whether in aid of navigation or for any other public purpose, that compensation should be paid him. In this, as in all other

cases when the interests of a private person are destroyed or damaged for the benefit of the public, it is more just that the public should pay for the damage done him than that a private person should suffer for the public benefit.

## Right to Erect Wharves.

Closely connected with the right of access to navigable water is the right of a riparian owner to construct wharves. It is clearly for the public interest, as well as for that of the private owner, that he should have the right to build wharves for the convenience and extension of commerce, provided that he does not thereby interfere with the public right of navigation. In the late case of Madison v. Mayers (Wis.) 40 L. R. A. 635, it is held that the owner of land abutting on a lake the title to which is in the state has the right to build wharves and piers in the aid of navigation, without obstructing it, far enough out through shoal water to reach water actually navigable for such boats as are or may be appropriately used in the lake. The annotation shows that this decision is consistent with most of the authorities. All the courts agree that the obstruction cannot be extended beyond the point of navigability, or be allowed, if it is in fact a nuisance; but there are some courts which absolutely deny the right of the riparian owner to build wharves beyond the line of private ownership, unless he has acquired the right to do so from the state. While the right is quite generally upheld, it is also held to be subject to such public regulation as the state may prescribe, one form of which is the establishment of harbor lines beyond which a wharf may not extend. While commerce is fostered by upholding the private right to construct wharves, it would be seriously endangered if the right was not subject to public regulation, and such regulation cannot be deemed to be an unjust infringement of the private right.

## Taxation of Intoxicants.

"The Voice" insists that "in the case of the liquor traffic taxation is a privilege" because the revenue therefrom "becomes an added bulwark to defend it from the public conscience and an added fetter to bind it like a millstone upon the already burdened liquor neck of our civilization." Doubtless the revenue from liquor taxes does have a tendency to make some people more tolerant of the evils growing out of the use of intoxicants. To the extent of that influence such a tax is objectionable. If the revenue therefrom prevents such legislation as the public welfare demands, then that revenue is evil and ought to be abolished. "The Voice" may believe that such is the case and that except for this revenue the people would declare for prohibition. But probably most people think otherwise. The revenue from the business cannot greatly bias an intelligent taxpayer because it is wofully insufficient to pay the taxes which result from the business. While it does have some tendency to bias people, it probably does not materially hinder legislation for the regulation or repression of the traffic. If intoxicating liquors are to be sold there are not many people except the dealers therein who wish to take the burden of taxation from them and put it upon the other articles of common use. As between a restricted, regulated, and taxed liquor traffic, and one that is absolutely unrestricted and untaxed, the people will have no hesitation in deciding.

The exact meaning of "The Voice" is not altogether certain. In declaring that in case of the liquor traffic taxation is a privilege, it doubtless has reference to the above-mentioned tendency of such tax to make men tolerant of the business. To that extent its argument has a sound basis, and the only question is as to its weight. But its language seems to mean more than this. In saying that such a tax is the "price of slavery and death," "The Voice" seems to say that the government sells a permission to do a business that was not lawful until made so by statute. That is another form of the oft-repeated, but untrue, assertion that the sale of intoxicating liquors has been "legalized." As a public teacher "The Voice" ought to know that such a statement is utterly false.

## Distrust of the People.

Distrust of the people is distrust of God in a country where the people rule. *Vox populi, vox dei*, is not an empty phrase, although it is often falsified by hasty or passionate popular clamor. But the truth that is in it can be found in the calm ultimate judgment of the people, which supports and must support every step of progress and every advance of right. A concealed or latent fear of the people is at

the bottom of much of the thinking and many of the plans of those who discuss our public evils and their remedies. The timid and short-sighted would hamper self-government to prevent misgovernment. Nearly every remedy proposed in recent years for political bossism, corruption, or oppression, has been in this direction. The mistake in all these is fundamental. To make the people at large feel their own responsibility for good government is the first and greatest requisite.

For vicious legislation, although not made by the people directly but by their representatives, the people are responsible, because of their responsibility for the fitness or unfitness of those whom they elect to represent them. For fear of bad legislation there has been a marked tendency in recent years to curtail the power of the legislatures. The courts have condemned bad statutes as unconstitutional when they involved purely legislative questions of public policy, on which courts have no legitimate right to interfere. If the legislature is wrong on such matters, the remedy is a better legislature. The people themselves must cure foolish or evil legislation, when it is within the range of legislative power and not prohibited by their Constitution. But constitutional prohibitions have multiplied. The tendency has been to restrain legislative action by restrictions increasingly minute which themselves constitute legislation rather than principles to govern legislation. This seems like a confession that the legislatures cannot be trusted, and there has been much cause for that feeling. Yet that is another way of confessing that the people are unfit for self-government.

In respect to cities, the distrust of the fitness of the people has been especially strong. Indeed, it has not been uncommon to hear the most pessimistic ideas declared as to the incapacity of cities for home rule. State legislatures, assuming a protectorate over cities, often take away their right to regulate local affairs and choose local officers. This, even when done in good faith for the welfare of the city, and not for mere partisan advantage, is a serious and pernicious mistake. Since we are rapidly becoming a nation of cities, a confession that the cities are unfit for self-government is a confession that the government of the people must soon prove a failure in this country.

Ultra conservatism in all matters of public interest is also greatly strengthened by this same distrust of the wisdom or purposes of the people. Wrongs are tolerated by some men because they fear that an attempt to cure them will not stop with just measures, but will run into injustice and oppression. Because reformers sometimes have unjust schemes timid and short-sighted persons take refuge in stolid opposition to every reform movement.

The theory of a free government is that every man is a statesman. The modern tendency has been, and still is, to regard the mass of free men as wards, who must be protected against their own folly. It is the same fatal blunder that fatuous parents make when, to shield their sons and daughters from making any wrong decisions, they keep them babies in judgment by deciding everything for them. A government of the people cannot be at the same time a government in which the people are under a protectorate. The responsibility must be upon them. Their mistakes, if they make them, must be left for them to remedy after they have been taught by experience.

There is health in the bones of this government by the people. It shall not perish from the earth. It is yet far from realizing its magnificient ideal of a self-governing nation in which every citizen is fit for personal and national self-government. But it has no greater danger than a tendency to lessen the personal responsibility of the common citizen. Every public measure that is based on a distrust of the people is vicious in its ultimate effect. Every genuine remedy for political wrong and all lasting progress must be based on a confidence in their wisdom and justice. Men who are large enough and wise enough for leadership are not afraid to trust them. Our greatest statesmen have had the largest faith in them, and that faith has been justified in every great crisis.

## Prize Thesis.

The prize for the best thesis on "The Commercial Clause of the Federal Constitution as Affected by the Police Power of the States," which was offered to the Northwestern University Law School, and consisted of a set of the "Lawyers' Reports, Annotated," was taken by Mr. F. J. R. Mitchell, whose office is now 1132 Marquette Block, Chicago. His thesis analyzes the decisions, and states the development and present condition of the subject with admirable clearness. It is exceedingly creditable to him and to the law school in which he was trained.

## Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

### Book 40, Parts 4 and 5.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.



The part containing any note indexed will be sent with CASE AND COMMENT for one year for $1.

## Among the New Decisions.

### Animals.

The property rights in dogs are sustained in Graham *v.* Smith (Ga.) 40 L. R. A. 503, by holding that the owner of a dog can maintain trover for its recovery in case of its wrongful conversion. That a dog may be the subject of larceny is also decided in Hamby *v.* Samson (Iowa) 40 L. R. A. 508, under a statute making it a crime to steal "chattels."

### Assignment.

An assignment of wages for the period of one year, by one working under a contract, whether by the day, the week, or otherwise, is held valid in Dolan *v.* Hughes (R. I.) 40 L. R. A. 735, under a statute allowing the assignment of future earnings.

### Awnings.

An awning which makes a permanent encroachment on a street is held, in Hibbard, S. B. & Co. v. Chicago (Ill.) 40 L. R. A. 621, to constitute a purpresture; and an order of the city council permitting it is held to be only a license which can be revoked at any time.

### Bees.

Finding a bee tree on the land of another is held, in State v. Repp (Iowa) 40 L. R. A. 687, to give the finder no right to the bees or to the tree, and, if he hives them and leaves them in a hive and on land, neither of which he owns, he is held to have no interest that can be the subject of larceny.

### Bills and Notes.

Mere promises to pay a forged note are held, in Barry v. Kirkland (Ariz.) 40 L. R. A. 471, insufficient to create a liability, in the absence of circumstances to create an estoppel, when the promises were made after maturity, without consideration, and without full knowledge of the material facts.

### Bonds.

The rule which makes a public officer an insurer of the safety of the public funds under his control is held, in State v. Gramm (Wyo.) 40 L. R. A. 690, to be based, not on the mere fact that he is a public officer intrusted with such funds, but upon the principle that his bond, either alone or in connection with the statutes, has made him an insurer, and he cannot be so held unless it is by virtue of such a contract.

### Buildings.

An apartment house constructed for residence purposes only is held, in McMurtry v. Phillips Invest. Co. (Ky.) 40 L. R. A. 489, to be a permissible structure under a deed limiting the use of the property to "residence purposes."

### Bridges.

An injury to a private barge, caused by the failure to open a drawbridge in response to proper signals because the bridge was stuck or bound, is held, in Corning v. Saginaw (Mich.) 40 L. R. A. 526, to give no right of action against a city which maintained the bridge for the public good only, and without deriving any benefit from it.

### Carriers.

The arrest of a street-car passenger by a policeman called by the conductor is held, in Little Rock Traction & E. Co. v. Walker (Ark.) 40 L. R. A. 473, to give no right of action against the street-car company, if the conductor's authority extended only to putting the passenger off the car.

For an assault with intent to commit rape upon a passenger, by a baggagemaster on a train, it is held, in Savannah, F. & W. R. Co. v. Quo (Ga.) 40 L. R. A. 483, that the railroad company is liable.

Liability of a shipper of lumber for injury to a railroad brakeman by negligent loading of the lumber on a car is denied in Fowles v. Briggs (Mich.) 40 L. R. A. 528, where the accident happened after it had become the duty of the carrier to have the car inspected.

### Commerce.

A state statute making it unlawful to keep a place in which the business of transmitting money for bets on horse races, etc., either within or without the state is carried on, is upheld in State v. Harbourne (Conn.) 40 L. R. A. 607, against the contention that it is an unconstitutional regulation of interstate commerce, as applied to the agent of a telegraph company who keeps such a place and transmits the money to another state by telegraph.

### Contracts.

A contract for the care of a person in an advanced stage of leprosy, by a laborer and his wife, who are unskilled people and have no authority to restrain the patient, and who have several small children in their family, is held, in Baltimore v. Fairfield Imp. Co. (Md.) 40 L. R. A. 494, to be an unreasonable one, the execution of which may be restrained because of its tendency to cause a dissemination of the leprosy.

### Corporations.

A signature to a blank transfer of stock, showing that it is made by a guardian of infants, is held, in O'Herron v. Gray (Mass.) 40

L. R. A. 498, insufficient to pass a good title to a person taking the stock without any transfer on the books of the corporation, without inquiry, and merely as a pledge for a debt from the cashier of the bank in which the shares were placed for safe keeping, but from which they were feloniously taken by the cashier.

A contract between equal owners of all but two shares of the stock of a corporation, each of whom controls one of those shares, by which they assume to divide and dispose of the property of the corporation, is held, in Sellers v. Greer (Ill.) 40 L. R. A. 589, to be ineffectual to bind the corporation.

## Custom.

A custom or usage of carpet making which would give the color mixer an exclusive title, as against his employer, to the various combinations and shades of color devised by him for use in the manufacture of carpets in his employer's mill, is held, in Dempsey v. Dobson (Pa.) 40 L. R. A. 550, to be unreasonable and therefore invalid.

## Easement.

An easement of light and air is held, in Kennedy v. Burnap (Cal.) 40 L. R. A. 476, not to pass by implication by a conveyance of a building with windows looking out over vacant lots retained by the grantor, although the enjoyment and value of the building will be greatly impaired by any structure thereon close to the building conveyed.

## Ejectment.

An ejectment for the projection of the eaves of a barn overhanging a boundary line is denied in Rasch v. Noth (Wis.) 40 L. R. A. 577, where the eaves of plaintiff's barn are lower than the other, and are so close to the line that the water from them falls on defendant's land.

## Evidence.

A statute making books of science or art presumptive evidence of facts of general notoriety or interest is held, in Union Pac. R. Co. v. Yates (C. C. App. 8th C.) 40 L. R. A. 553, not to include medical works so as to make them evidence of the opinions or theories therein expressed. On the other hand, scientific works containing statistics of mechanical experiments and tabulations of their results, when recognized as standard authority and generally relied upon by experts in that field, are held, in Western Assurance Co. v. J. H. Mohlman Co. (C. C. App. 2d C.) 40 L. R. A. 561, to be admissible to support the opinions of experts.

## Fences.

The duty to trim a hedge fence planted by a landowner on his part of a division line is held, in Kinney v. Kinney (Iowa) 40 L. R. A. 626, not to be imposed upon him by a statute which authorizes such hedges without specifying their height or how they shall be trimmed.

## Fright.

Recovery for injuries occasioned by fright, as to which the authorities are conflicting, was recently allowed in Mack v. South Bound R. Co. (S. C.) 40 L. R. A. 679, although there was no physical injury sustained except that caused by the fright.

## Harbors.

The lease of harbor area in front of tide lands, for curing and canning fish and storing ice for packing and handling the fish, is held, in State, Denny, v. Bridges (Wash.) 40 L. R. A. 593, to be unlawful under the state Constitution reserving such area "for maintaining wharves, streets, and other conveniences of navigation and commerce," as the word "commerce" is qualified by the word "navigation."

## Husband and Wife.

An action by a wife against persons who have wrongfully induced her husband to leave her is held, in Gernerd v. Gernerd (Pa.) 40 L. R. A. 549, to be maintainable where she is free from common-law disabilities and entitled to sue in her own name and right for torts done to her. But she is held to have no right of action against her husband's parents for advising him, in good faith, to separate from her.

The father's duty to maintain a child after divorce, in the absence of any provision in the decree on the subject, is held, in *Re* Zilley (Wis.) 40 L. R. A. 579, to continue as before, and his promise to pay the mother for maintaining a child after the time when the father was entitled to have the custody of the child

under a decree of divorce granted for the father's fault is implied, although he has ineffectually tried to get the child and has declared that he would not pay the mother for his keeping.

An order that the father pay for the support of minor children awarded to the custody of the mother by a divorce decree which made no provision for their maintenance is held, in McKay v. Superior Court (Cal.) 40 L. R. A. 585, to be obtainable by petition in the divorce case long after the decree had become final and the mother had remarried.

An action by a divorced wife against her former husband for the maintenance of a minor child is upheld in Gibson v. Gibson (Wash.) 40 L. R. A. 587, when the father is found unfit to have the custody of the child, and this has been awarded to her.

## Infants.

The rule that the custody of a child is to be determined, not by the question who can provide the greater luxury or give the child more property, but with whom the child is likely to be reared and trained so as to make the better citizen, is applied in Stringfellow v. Somerville (Va.) 40 L. R. A. 623, as against the father of the child, who had allowed its custody to remain for five or six years with sisters of his deceased wife, in accordance with her will.

## Injunction.

A mandatory injunction to compel the secret password of a grand lodge to be given to a delegate from a subordinate lodge of a benevolent society, and to permit him to participate in the deliberations, is held, in Wellenvoss v. Grand Lodge K. of P. (Ky.) 40 L. R. A. 488, to be beyond the province of a court of equity, unless some right of property is endangered, although an irreparable injury may be done to the delegate and his lodge by excluding him.

The mere possibility of injury by an unconstitutional statute, which may prevent insurance companies from making such contracts as persons might otherwise procure them to make is held, in Business Men's League v. Waddill (Mo.) 40 L. R. A. 501, insufficient to sustain an injunction against the approval of a uniform policy of insurance under an unconstitutional statute by the superintendent of insurance.

## Innkeepers.

The liability for goods stolen from a peddler's cart in the custody of an innkeeper is upheld in Cohen v. Manuel (Me.) 40 L. R. A. 491, although the peddler had no license to peddle, as he did not lodge at the inn as a peddler.

## Insurance.

Death caused by blood poisoning by germs in cotton placed by a dentist in a wound made by the removal of teeth to stop hemorrhage, is held, in Kasten v. Interstate Casualty Co. (Wis.) 40 L. R. A. 651, to be within a condition of an accident policy denying liability for injuries resulting "wholly or in part from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled."

An abrasion of the skin of a toe, caused by unexpected friction of a new shoe, is held, in Western Commercial Travelers' Association v. Smith (C. C. App. 8th C.) 40 L. R. A. 653, to be an accidental injury within the meaning of an insurance policy.

## License.

A license tax on brokers is held, in Banta v. Chicago (Ill.) 40 L. R. A. 611, to extend to a member of a stock exchange who buys and sells stocks, bonds, or securities on the floor of the exchange in his own name, and makes or receives delivery and payment in the execution of orders for his customers.

## Masses.

A bequest to a parish priest of a certain church, to say masses for the testator, is held, in Sherman v. Baker (R. I.) 40 L. R. A. 717, to be valid as an outright gift to the parish priest who is then in office. Such a bequest is also held, in Harrison v. Brophy (Kan.) 40 L. R. A. 721, to be a gift direct to the donee, with an injunction to the performance of the ceremonial named, and not as a trust which requires beneficiaries in being who can enforce it. Regarding such a bequest as a trust, it is held, in Hoeffer v. Clogan (Ill.) 40 L. R. A. 730, that it is not a mere private trust, but a valid charitable gift aiding the support of the clergy and public worship, since it will be presumed that the masses will be said in public. On the other hand, such a bequest is held void in McHugh v. McCole (Wis.) 40 L.

R. A. 724, on the ground that it is a trust, and that there are no beneficiaries who can enforce performance of it.

### Municipal Corporations.

For personal injury caused by the explosion of a cannon cracker on a city street on the Fourth of July in violation of an ordinance, when persons assembled there are exploding firecrackers without any common purpose to injure anyone, it is held, in Aron v. Wausau (Wis.) 40 L. R. A. 733, that no recovery can be had from the city under a statute creating a liability for injury done by a mob or a riot.

For the drowning of a child in a pond on private property not on or dangerously near to a street, it is held, in Omaha v. Bowman (Neb.) 40 L. R. A. 531, that the city is not liable, even if it had caused the formation of the pond by obstructing a stream, causing an overflow on the premises.

### Railroads.

Abutments in a highway in accordance with a plan approved by railroad commissioners for the abolition of a grade crossing are held, in Bristol v. New England R. Co. (Conn.) 40 L. R. A. 479, to be lawfully made, and the town cannot enjoin their erection.

### Religious Societies.

Liability of a bishop of the Roman Catholic Church to a priest in his diocese for salary is held, in Baxter v. McDonnell (N. Y.) 40 L. R. A. 670, not to exist in the absence of an express agreement; and the bishop is held not to be liable on his predecessor's agreement, although he has received trust property from the former bishop.

### Sale.

On the question of the passing of title by delivering property to a carrier for transit to a vendee, it is held, in A. J. Niemeyer L. Co. v. Burlington & M. R. R. Co. (Neb.) 40 L. R. A. 534, that, if the property is consigned to the vendor himself, his agent, or his order, he is presumed to retain the title, and that, if he consigns it to the vendee, the presumption is that he intended the title to vest at once, unless he prepaid the freight, in which case he is presumed to retain title during transit, so that the right of stoppage *in transitu* continues for that time.

### Set-Off.

The maturity of either debt or claim at the time of the assignment for creditors by one of the parties is held, in *Re* Hatch (N. Y.) 40 L. R. A. 664, sufficient to give a right of set-off in equity.

### Sheriffs.

The failure of a sheriff to resist a mob that takes a prisoner from the jail, if due to his belief that he could not cope with the mob, is held, in State, Cocking, v. Wade (Md.) 40 L. R. A. 628, insufficient to make him liable in a civil action; and the sheriff's malicious act in aiding the mob is held to create no liability on his bond.

### State Institutions.

An agricultural and mechanical college, which is strictly a public or quasi corporation created by the laws of Oklahoma, is held, in Oklahoma Agricultural & M. College v. Willis (Okla.) 40 L. R. A. 677, to be not subject to be sued in the absence of express statutory authority.

### Street Railways.

The killing of a dog by an electric car, in consequence of the motorman's negligence, is held, in Citizens' Rapid-Transit Co. v. Dew (Tenn.) 40 L. R. A. 518, to render the street-railway company liable for the damages.

### Tradenames.

The right to use the name of a retiring partner under a contract for the continuance of the use of such name "in the style of the firm" is held, in Bagby & R. Co. v. Rivers (Md.) 40 L. R. A. 632, to give no right to the use of the name by a corporation formed by the continuing partner and others for carrying on the same business.

### Voters and Elections.

Pasting or sticking another ticket on an official ballot is held, in Fletcher v. Wall (Ill.) 40 L. R. A. 617, to be unlawful under a statute requiring the names of all candidates to be printed on the ballot, except names written thereon by the voter, and requiring him to mark a cross opposite the name of each candidate voted for.

### Waters.

The right to fill up a natural depression which has carried off surface water from a large section of the city, although it is not technically a watercourse, is denied, and an injunction against it granted in favor of a city, in Waverly *v.* Page (Iowa) 40 L. R. A. 465, where the city has undertaken to keep it open, and its obstruction will be followed by serious injury to the city and its inhabitants.

Possessory rights to rights of way for irrigating ditches, and the right to the use of water in them, are held, in Ada County F. Irrig. Co. *v.* Farmers' Canal Co. (Idaho) 40 L. R.A. 485, to be rights which may have a separate and independent existence, so that the ditch may be conveyed, reserving the water right, or *vice versa*.

A regulation of a water company, by which it refuses to turn on water for a building until unpaid rates of previous owners or tenants are paid, is held, in Turner *v.* Revere Water Co. (Mass.) 40 L. R. A. 657, to be unreasonable and invalid, unless authorized by statute.

### Wharves.

The right to erect wharves in shoal water far enough out into the lake to reach water navigable for such boats as may properly be used thereon, is held, in Madison *v.* Mayers (Wis.) 40 L. R. A. 635, to belong to the owners of land abutting on the lake, although the title is in the state.

## Recent Articles in Law Journals and Reviews.

"The Punishment of Juvenile Offenders."—23 Law Magazine and Review, 289.

"Piracy in Trade Names and Descriptions."—23 Law Magazine and Review, 299.

"The Prisons Bill."—23 Law Magazine and Review, 309.

"Divorce and Jewish Law: A Study in Comparative Jurisprudence."—23 Law Magazine and Review, 317.

"Civil Business on Circuit."—23 Law Magazine and Review, 323.

"Judge Jeffreys."—23 Law Magazine and Review, 336.

"Stockbrokers' Right to Indemnity."—23 Law Magazine and Review, 355.

"Legal Education from a 'Coach's' Point of View."—23 Law Magazine and Review, 373.

"Current Notes on International Law."—23 Law Magazine and Review, 384.

"The Law of Gambling Contracts."—47 Central Law Journal, 169.

"Some Medico-Legal Questions in Personal Injury Cases."—16 Medico-Legal Journal, 93.

"The Right of Privacy as Recognized and Protected at Law and in Equity."—47 Central Law Journal, 148.

"Transitory Actions; Jurisdiction of Courts; Actions for Death by Negligence; Suits in Other Jurisdictions."—47 Central Law Journal, 158.

"The Nonliability of a Master for Injuries Sustained by an Employee Occasioned by the Negligence of a Vice Principal at the Time Doing a Servant's Work."—47 Central Law Journal, 130.

"Marriage; Conflict of Laws."—47 Central Law Journal, 134.

"International Aspects of the Spanish-American War."—34 Canada Law Journal, 477.

"Right of National Banks to Charge Usury."—47 Central Law Journal, 196.

"Probable Cause or Malice in Malicious Prosecution."—18 Canadian Law Times, 169.

"Equitable Estoppel."—18 Canadian Law Times, 181.

"Nonexpert Opinion Evidence."—47 Central Law Journal, 213.

## New Books.

"United States Statutes Second Session Fifty-Fifth Congress, 1897-8." 802 pages. (Washington Law Book Co., Washington, D. C.) 1 Vol. $1.50.

"Puterbaugh's Michigan Chancery." 3d Edition. (Callaghan & Co., Chicago, Ill.) 1 Vol. $6.

"Jewett's Election Manual." 6th Edition. (Matthew Bender, Albany, N. Y.) 1 Vol. $2. Paper, $1.50.

"The Law of Private Corporations." By H. O. Taylor. 4th Edition. (Kay & Bro., Philadelphia, Pa.) 1 Vol. $5.

"Collier on Bankruptcy." (L. C. P. Co., Rochester, N. Y.) 1 Vol. $5.

"Preliminary Treatise upon the Law of Evidence." By Jas. B. Thayer. (Little, Brown & Co., Boston, Mass.) 1 Vol. $3.50.

"Cooley's Constitutional Law." 3d Edition. Revised by A. C. McLaughlin. (Little, Brown & Co.) 1 Vol. $3. Cloth, $2.50.

"The War Revenue Law of 1898 Explained."

By John M. Gould and E. H. Savary. (Little, Brown & Co.) 1 Vol. $1.25.

"A Trustee's Handbook." By A. P. Loring. (Little, Brown & Co.) 1 Vol. $1.50.

"Massachusetts Land Transfer Act of 1898." Annotated by C. S. Rackemann. (Little, Brown & Co.) 1 Vol. $1.

"Virginia Pocket Code," with Judge Burks' Notes. (Hurst & Co., Pulaski, Va.) 1 Vol. $6.

## The Humorous Side.

THE CHRISTIANITY, B. C.—In attempting to name ten Roman emperors on an examination for the bar, a student mentioned Antoninus, Crassus, and several other names ending in *us*, closing the list with "Augustine, the founder of Christianity," but added, as an afterthought, "This was before the birth of Christ, of course."

AN INADVERTENT UNDERTAKER.—A Philadelphia undertaker who was the administrator of the estate of a servant girl, amounting to about $1,100, generously provided a "first-class funeral" for her, and thoughtfully retained over $800 of her estate to reward himself for his generosity. In the opinion of the orphans' court it is said that an imposing cortege of twelve carriages was provided, with six professional pall bearers, each adorned with a buttonhole bouquet, while the procession of mourning relatives, numbering but five persons, was not similarly ornamented. The court adds, "This was evidently an oversight of the undertaker." A $500, silk-lined, gold-handled, cedar, couch casket, was provided and used in the procession and charged in the bill, but amid the many details of so elaborate a ceremony and during the very natural agitation of the bereaved undertaker, a cheap one was accidentally substituted for it before the interment.

NOT A STEM WINDER.—The official who believes that red tape is sacramental has been found again in an English "Office of Works." A clock for a metropolitan county court was obtained by means of routine requisition papers, but when the time to wind it came no key could be found. To a request for the key, the Office of Works replied that the requisition called for a clock and did not mention a key, and that if a key was wanted a fresh requisition was necessary. Thus carefully is the British Constitution defended.

THE INERRANCY OF THE COURT.—A Georgia correspondent sends us the following:—As suggested by your editorial on "The Right to Overrule a Bad Decision" I would refer you to the following extract, delivered by Chief Justice Bleckley, in the case of Ellison *v.* Georgia Railroad Co., in which a radical change was made in the law of amendment of the state of Georgia, 87 Ga. 691.

"Bleckley, Chief Justice:

1. Some courts live by correcting the errors of others and adhering to their own. On these terms courts of final review hold their existence, or those of them which are strictly and exclusively courts of review, without any original jurisdiction, and with no direct function but to find fault or see that none can be found. With these exalted tribunals, who live only to judge the judges, the rule of *stare decisis* is not only a canon of the public good, but a law of self-preservation. At the peril of their lives they must discover error abroad and be discreetly blind to its commission at home. Were they as ready to correct themselves as others, they could no longer speak as absolute oracles of legal truth; the reason or their existence would disappear, and their destruction would speedily supervene. Nevertheless, without serious detriment to the public or peril to themselves, they can and do admit now and then, with cautious reserve, that they have made a mistake. Their rigid dogma of infallibility allows of this much relaxation in favor of truth unwittingly forsaken. Indeed, reversion to truth in some rare instances is highly necessary to their permanent well-being. Though it is a temporary degradation from the type of judicial perfection, it has to be endured to keep the type itself respectable. Minor errors, even if quite obvious, or important errors if their existence be fairly doubtful, may be adhered to and repeated indefinitely; but the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not *Stare decisis*, but *Fiat justitia ruat cœlum*."